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In the Supreme Court of the United States

OCTOBER TERM, 1978

KATHLEEN R. REITER, PETITIONER

v.

SONOTONE CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Private actions for damages under Section 4 of the Clayton Act, 15 U.S.C. 15, have served an important role, supplemental to that of public actions, in enforcing the antitrust laws. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972). The United States therefore has an interest in preserving the effectiveness of private actions, and it has participated as amicus curiae in many private antitrust cases that this Court has considered in recent years. See, *e.g.*, *City of*

Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977); *Group Life and Health Insurance Co.* v. *Royal Drug Co.*, No. 77-952, argued Oct. 11, 1978.

The United States has a special interest in this case because Section 4A of the Clayton Act, 15 U.S.C. 15a, gives the United States a right to recover damages for injuries to its business or property resulting from violations of the antitrust laws. The United States purchases, as consumer, substantial quantities of goods. In these cases the United States may stand in the same relation to any price fixer as petitioner stands to the persons from whom she buys, and the adoption of the court of appeals' position therefore could restrict the right of the United States to recover for loss caused by overcharges made by sellers.

QUESTION PRESENTED

Whether consumers who pay higher prices for goods or services as a result of antitrust violations are injured in their "property" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. 15.

STATEMENT

Petitioner commenced this suit on behalf of a class seeking treble damages from respondents, five hearing aid manufacturers, under Section 4 of the Clayton Act, 15 U.S.C. 15.[1] The complaint alleges that

[1] Petitioner seeks to represent a class of all persons in the United States who have purchased hearing aids from respondents. No decision on the propriety of this class definition has been made.

these manufacturers have committed a variety of antitrust violations that damaged petitioner and members of her class by causing them to pay higher prices for hearing aids and services than would have prevailed in a competitive marketplace.[2] Respondents argued that petitioner and the class have no treble damages remedy under Section 4 because they have not suffered any business or commercial injury.[3]

The district court rejected respondents' argument. It pointed out that Section 4 authorizes recovery by persons injured in their "business or property" and that *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396 (1906), establishes that "property" includes "the money of the plaintiff" (Pet. App. A-9). The term "property" would be redundant, the district court reasoned, if it embraced only business interests (*ibid.*). The court also observed that the legislative history of Section 4 described in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977), indicates that Congress intended to give a treble damages remedy to retail consumers. A requirement that plaintiffs establish

[2] The complaint alleges violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. 14. It challenges various constraints that respondents allegedly placed on dealers in the distribution and sale of hearing aids. In particular, the complaint charges that respondents conspired to fix the prices at which their dealers would sell hearing aids to consumers (Pet. App. A-13).

[3] Respondents also argued that the alleged injuries were too remote from the antitrust violations to confer standing to sue for damages under Section 4. That issue was not reached by the court of appeals (Pet. App. A-20 n.9).

injury to a business interest as a prerequisite to suit would frustrate this intent, the court reasoned (*id.* at A-9 to A-11).

The district court certified the case for interlocutory appeal pursuant to 28 U.S.C. 1292(b), and the court of appeals reversed (579 F.2d 1077; Pet. App. A-12 to A-31). It held that consumers who allege "no injury of a commercial or competitive nature are not injured in their property under Section 4 of the Clayton Act" (*id.* at A-30 to A-31) and therefore may not recover damages for antitrust violations.[4] The court of appeals relied on certain legislative history, the perceived absence of a square holding to the contrary by this Court or a court of appeals, and its belief that many "gigantic consumer class actions" are anticompetitive and might be used to exact unfair settlements from small or medium-sized businesses and thereby "preserve an oligopolistic economic climate" (*id.* at A-28, A-29).

[4] The court of appeals did not address the question whether petitioner's treble damages action is foreclosed by the direct purchaser requirement of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) (Pet. App. A-14 n.3). Petitioner contended in the courts below that this case falls within an exception to the direct purchaser requirement described in *Illinois Brick*. See 431 U.S. at 736 n.16. Although the question has not yet been decided in this case, we believe that *Illinois Brick* does not bar a suit of this kind. The district court described petitioner as a "classic consumer plaintiff" (Pet. App. A-3) because the complaint charges a conspiracy to fix the retail price of a consumer product which petitioner purchased. The direct victim of such a retail price maintenance scheme is the consumer. Because "market forces have been superseded" by retail price maintenance schemes (431 U.S. at 736 n.16), the antitrust overcharge is not "passed on" to the consumer through intervening economic markets, and the trial court ordinarily need not apportion damages among multiple levels of purchasers.

A petition for rehearing *en banc* was denied by a vote of four to three. The three dissenting judges stated that the panel's decision conflicted with the rationale of this Court's decisions in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, *supra*, and *Pfizer Inc.* v. *Government of India*, 434 U.S. 308 (1978), effectively nullified the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 15c-15h, and was an improper substitution of judicial policy for the legislative view of the desirability of treble damages actions (Pet. App. A-31 to A-33).

SUMMARY OF ARGUMENT

Section 4 of the Clayton Act, 15 U.S.C. 15, authorizes suit by "any person" injured in his "business *or* property" (emphasis supplied). The use of the disjunctive is significant. The provision that damages may be recovered for injuries to "property" confirms that Section 4 is not limited to business harm. Understood in its ordinary sense, "property" embraces all forms of wealth, including money. Thus a consumer "whose property is diminished by a payment of money wrongfully induced is injured in his property" and may bring suit under Section 4. *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396 (1906).

The legislative history shows that Congress intended to protect consumers under the Sherman Act of 1890 and the Clayton Act of 1914. Congress intended the treble damages remedy prescribed in those Acts to "give private citizens who are injured by these combinations or monopolies for the advancement of cost * * * a civil remedy in the courts" (21 Cong. Rec. 2563 (1890) (remarks of Sen. Hoar)). The decisions of this Court recognize that purpose. See, *e.g.*, *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 312-315 (1978) (upholding consumer claims of foreign nations and stating that Section 4 protects "American consumers"). Even if there is a requirement that the injury to property take place in the course of commercial affairs, that requirement is satisfied here, because hearing aids are purchased in commercial transactions. That consumers are not in the business of buying hearing aids should be irrelevant: the purchase is commercial nonetheless.

Suits under Section 4 not only compensate the victims of antitrust violations but also "deter violators and deprive them of 'the fruits of their illegality.'" *Pfizer Inc.* v. *Government of India*, *supra*, 434 U.S. at 314. Injured parties suing for treble damages thus serve as "private attorneys general" who preserve competitive market conditions. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972). Unless consumers may recover damages for the injuries caused directly to them, there will be little deterrence of conspiracies to increase the price of consumer goods. Consumers

are the only direct victims of retail price fixing conspiracies and the only private parties in a position to bring suit against them. The importance of preserving competition in retail markets can scarcely be overstated. Retail nonbusiness consumers purchase more than $1.2 trillion in goods and services annually.

The court of appeals believed that consumer class actions frequently are meritless and impose undue burdens on small business firms. The court stated that the deterrent value of such suits does not outweigh their harmful effects, and it concluded that government enforcement should supersede private consumer litigation (Pet. App. A-28 to A-29). But that position conflicts with the congressional determination that private suits are essential to achieve redress and deterrence. Courts may not substitute their views for those of Congress concerning the appropriate method to enforce the antitrust laws. See *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978). Moreover, the court's conclusion that small business firms suffer disproportionate burdens from antitrust litigation is unsupported. Small businesses are unlikely defendants in such actions. They do not have the means to satisfy large treble damages judgments, and they usually do not have the market power to inflict the sort of damages for which plaintiffs would recover. Small businesses are often members of the class of plaintiffs who seek redress from antitrust violators, but they are rarely named as defendants in such proceedings.

Unless consumers have a right to recover damages, the *parens patriae* title of the Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. 15c-15h, would be nullified. That Act provides that state attorneys general may bring suit to obtain redress for property injuries suffered by consumers as a result of antitrust violations. The *parens patriae* provision does not create new rights. It merely provides a new procedure to assert the Section 4 claims of consumers. *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 734 n.14 (1977). If, as the court of appeals held, consumers do not suffer "property" injuries as a result of antitrust overcharges, and may not bring suit under Section 4, then there are no consumer claims to be vindicated under the *parens patriae* provision. The Court should construe Section 4 in a way that avoids this frustration of the intent of Congress.

ARGUMENT

CONSUMERS WHO PAY HIGHER PRICES FOR GOODS OR SERVICES AS A RESULT OF ANTITRUST VIOLATIONS SUFFER INJURY TO THEIR "PROPERTY" WITHIN THE MEANING OF SECTION 4 OF THE CLAYTON ACT

Based on its view of legislative history and public policy, the court of appeals held that consumers injured by antitrust violations may not bring suit under Section 4 of the Clayton Act. In the court's view, Congress' sole purpose in enacting Section 4 was to protect business competitors against commercial injury. Although the court correctly concluded that Congress intended to permit recoveries to redress

"business" injuries, we submit that Section 4 was not limited to such injuries. An analysis of the text and legislative history of Section 4 establishes that it "was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977).

A. A Literal Reading Of Section 4 Of The Clayton Act Shows That Consumers Injured By Antitrust Violations May Bring Suit

"The starting point in every case involving the construction of a statute is the language itself.'" *International Brotherhood of Teamsters* v. *Daniel*, No. 77-753 (Jan. 16, 1979), slip op. 6. Courts should "read the statutory language in its ordinary and natural sense." *United States* v. *Cooper Corp.*, 312 U.S. 600, 605 (1941) (construing Section 7 of the Sherman Act). So read, Section 4 establishes that consumers may recover for their economic losses.

Section 4 of the Clayton Act provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States * * without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit including a reasonable attorney's fee.

The breadth of the grant is demonstrated by the provision that "any person" may recover for antitrust injuries. The statute is "inclusive rather than exclusive," extending to "natural persons" as well as

corporations. *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 312 n.9 (1978).

Persons suing under Section 4 may obtain redress for two kinds of injury. They may recover for injury to their "business," and they may recover for injury to their "property." The term property encompasses all forms of wealth, including money. Whether or not an overcharged consumer can demonstrate business injury, he may recover if his wealth has been diminished by an antitrust violation.

The contrary holding of the court of appeals, which limits the coverage of Section 4 to business injuries, ignores the distinction between "business" and "property." The court's interpretation replaces the statutory expression "business *or* property" with "business property." It eliminates the disjunctive employed by Congress and thereby deprives the term "property" of independent significance. That approach disregards the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative" (*Colautti* v. *Franklin*, No. 77-891 (Jan. 9, 1979), slip op. 13). Each of the words in the disjunctive expression should be given its "separate meaning" (*FCC* v. *Pacifica Foundation*, No. 77-528 (July 3, 1978), slip op. 11).

This Court discussed the "business or property" phrase more than 70 years ago; it concluded that the words have different meanings, and that overcharged consumers are injured in their property. *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906). In *Chattanooga* a municipality brought

suit against a supplier of pipe. The action was brought "on the ground that the [plaintiff], as a consumer, has been compelled to pay more for the goods it purchased by reason of the fact that the seller was a party to an illegal combination" (*id.* at 391). Suit on that ground was impossible, the defendant argued, because the antitrust laws were intended only "to protect the independent trader by giving him a right of action if injured in his business or property * * *" (*ibid.*). This Court disagreed, holding that the statute supported the plaintiff's right to recover:

> The city was * * * injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property.

Id. at 396. *Chattanooga* controls here. It cannot be distinguished, as the court of appeals incorrectly concluded (Pet. App. A-21), because the city "arguably" suffered an injury to its business of being a municipality. This Court's reasoning in *Chattanooga* turned on the fact that the city was injured in its capacity as a consumer. The Court held that price increases caused by antitrust violations reduce the "property" of the purchaser, which is a sufficient basis for recovery.[5]

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[5] The vitality of *Chattanooga* is shown by this Court's repeated reliance on it. See, *e.g.*, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 489-490 (1968); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972); *Pfizer Inc.* v. *Government of India*, *supra*, 434 U.S. at 316 nn.15-16.

B. The Legislative History Confirms That Congress Intended To Authorize Awards Of Damages To Injured Consumers

The principal basis for the court of appeals' conclusion that consumers may not recover damages under Section 4 was the belief that Congress intended to foreclose consumer remedies (Pet. App. A-14 to A-19). A review of the legislative history discloses, however, that Congress' objective in enacting the antitrust laws was to protect consumers, and that consumers were intended to have remedies.

1. *The primary purpose of the Sherman Act was consumer protection*

In December 1889 Senator Sherman introduced the bill that later became the Sherman Act of 1890.[6] Section 1 of the bill (S. 1, 51st Cong., 1st Sess. (1889)) provided:

> [A]ll arrangements, contracts, agreements, trusts, or combinations * * * made with a view, or which tend, to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or in the production, manufacture, or sale of articles of domestic growth or production * * * and all arrangements, contracts, agreements, trusts, or combinations * * * designed, or which tend, to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful, and void.

[6] The legislative history is recounted in Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. Law & Economics 7, 14-21 (1966); H. Thorelli, *The Federal Antitrust Policy* 166-232 (1954); Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. Chi. L. Rev. 221 (1955).

During debates on the measure, Senator Sherman repeatedly referred to the need to protect consumers from overcharges resulting from combinations and conspiracies.[7] See, *e.g.*, 21 Cong. Rec. 2457 (1890) ("the law of selfishness, uncontrolled by competition, compels [the combination] to disregard the interest of the consumer * * * [I]t tends to advance the price to the consumer of any article produced * * *"); *id.* at 2460 ("The price to the consumer depends upon the supply, which can be reduced at pleasure by the combination * * * The aim is always for the highest price that will not check the demand, and, for most of the necessaries of life, that is perennial and perpetual"); *id.* at 2461 ("These trusts and combinations are great wrongs to the people * * * They increase beyond reason the cost of the necessaries of life and business * * *"). See also the remarks of Senator Pugh, *id.* at 2558 ("the existence of trusts and combinations to limit the production of articles of * * * commerce for the purpose of * * * increasing prices to consumers has become a matter of public history, and the magnitude * * * of the evils resulting

[7] As Professor Bork has pointed out, "[t]he views of Senator Sherman * * * are crucial to an understanding of the intent underlying the law that bears his name. Sherman was the prime mover in getting antitrust legislation considered and passed by the Senate. He was also by far the most articulate spokesman for antitrust in Congress." *Legislative Intent and the Policy of the Sherman Act, supra*, at 14. Accord, H. Thorelli, *The Federal Antitrust Policy, supra*, at 213.

directly to consumers * * * are known and admitted everywhere"). Even opponents of the bill, who favored different measures to govern anticompetitive agreements and combinations, emphasized the need to protect consumers against enhanced retail prices resulting from breakdowns in competition. See, *e.g.*, remarks of Senator George, 21 Cong. Rec. 1767-1768, 3147-3149 (1890).

Although the Senate Judiciary Committee rephrased Senator Sherman's bill before enactment, there is no suggestion that the underlying purpose of the statute changed.[8] Senator Sherman voted in favor of the bill as redrafted by the Judiciary Committee. 21 Cong. Rec. 3145 (1890). And during debates on the amended bill in the House of Representatives, the need to protect consumers by passage of the law was emphasized once again:

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[8] Both houses passed the bill following the Senate Judiciary Committee's redraft. See H. Thorelli, *The Federal Antitrust Policy, supra*, at 199-200, 209-210. In its final form, Section 1 of the statute prohibited

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * *.

Section 2 prohibited any person to

> monopolize or attempt to monopolize, or combine or conspire with any other person to monopolize any part of the trade or commerce among the several States * * *.

See 26 Stat. 209. As Professor Bork notes, "though Sherman's bill was completely rephrased by the Judiciary Committee * * * the final bill, in its substantive policy aspects, embodied Sherman's views." *Legislative Intent and The Policy of the Sherman Act, supra*, at 14-15.

> [T]he very object of these giant schemes of combined capital * * * [is to] repress, reduce, and control the volume of every article that they touch, so that the cost to consumers is increased * * * We know that by such means the trusts which control the markets on sugar, nails, oils, lead, and almost every other article of use in the commerce of this country have advanced the cost of such articles to every consumer, and * * * have stolen untold millions from the people.

21 Cong. Rec. 4101 (1890) (remarks of Rep. Heard). See also *id.* at 4098 (remarks of Rep. Taylor); *id.* at 4102 (remarks of Rep. Fithian).

In sum, the legislative history amply supports the conclusion that "[t]he Sherman Act was clearly presented and debated as a consumer welfare prescription." R. Bork, *The Antitrust Paradox* 66 (1978).

2. *Congress intended to authorize recoveries by overcharged consumers*

Congress intended to help consumers obtain the substantive benefits of the antitrust laws through a specific device: consumers injured by antitrust violations were given a private damages remedy in federal court. Senator Sherman's original bill, S. 1, 51st Cong. 1st Sess. Section 2 (1889), provided that "any person or corporation injured or damnified" by an illegal combination or agreement could sue to recover "the full consideration or sum paid by him for any goods, wares, and merchandise included in or advanced in price by said combination." In debates concerning this provision, Senators Sherman and

Hoar[9] agreed that "the purpose [is] * * * to give private citizens who are injured by these combinations or monopolies for the advancement of cost or preventing men from freely competing, a civil remedy in the courts." 21 Cong. Rec. 2563 (1890). The provision was intended to give "a private remedy to every person injured." *Ibid.* To that end, Congress authorized private suits without regard to the amount in controversy:

> Sometimes the damages would be too slight to give the courts of the United States jurisdiction. In the case of a single individual whose bread has been advanced in price or whose small expenditures have been somewhat increased, there is no remedy for him. * * * * * Now, sir, under these circumstances it is important to citizens that they should have some remedy in a court of general jurisdiction in the United States to sue for and recover the damages they have suffered.

21 Cong. Rec. 2569 (1890) (remarks of Sen. Sherman). The availability of attorney's fees, costs, and punitive damages in such actions, Senator Sherman believed, would encourage individual consumers to bring suit.[10] *Ibid.* See also *id.* at 2612 (remarks of Sen. Teller).

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[9] Senator Hoar was a member of the Judiciary Committee that redrafted Senator Sherman's bill and is believed to be the author of the treble damages provision contained in the final version. See H. Thorelli, *The Federal Antitrust Policy, supra,* at 213.

[10] For this reason, Senator Sherman rejected the contention of his opponents that an individual consumer would not have an incentive to bring suit to recover the "enhanced price that he has to pay for a commodity in the market." *Id.* at 2610.

As finally enacted, the Sherman Act created a right of action in favor of "[a]ny person who shall be injured in his business or property" by a violation of the Act, without respect to the amount of controversy. The statute authorized treble damages plus the cost of prosecuting the suit, including a reasonable attorney's fee. See Section 7 of the Act, ch. 647, 26 Stat. 210.[11] Although opponents of the measure objected that it was not sufficiently helpful to injured consumers because procedural devices such as class actions were not prescribed, no one suggested that recovery should be denied to consumers.[12] See 21 Cong. Rec. 1767-1768, 3147-3148, 3150 (1890) (remarks of Sen. George). Proposals for class litigation were rejected only because Congress then believed that such procedures could engender complications that would retard the prosecution of consumer claims.[13] See the remarks of Sen. Edmunds, *id.* at 3148. Senator Edmunds stressed that the scope of relief was adequate as it

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[11] Section 7 was "only a rewriting by Senator Hoar of Section 2 of [the original] bill with the addition of the triple damage provision of the old Statute of Monopolies." H. Thorelli, *The Federal Antitrust Policy, supra,* at 213.

[12] Hyperbolic statements of opponents of the legislation predicting that consumers would be encumbered by procedural difficulties are, of course, no ground for restricting the coverage of the statute. See *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 204 n.24 (1976).

[13] Today, of course, the Federal Rules of Civil Procedure authorize class actions within guidelines intended to facilitate such litigation. See Fed. R. Civ. P. 23. In addition, Congress has created new procedures by statute to promote collective litigation of consumer antitrust claims. See pages 29-32, *infra.*

stood, allowing "everybody" to sue "anybody who wrongs him" without regard to the amount in controversy. *Ibid.*

3. *Congress facilitated consumer suits under Sections 4 and 5 of the Clayton Act*

The Clayton Act, enacted in 1914, expanded the private remedy that had been created by the Sherman Act. The amendment made treble damages available to any person injured in his business or property by "anything forbidden in the antitrust laws." See Section 4 of the Clayton Act, ch. 323, 38 Stat. 731.[14] Aside from permitting treble damages suits for both Sherman and Clayton Act violations, the provision did not alter the basic grant of relief. See *Pfizer Inc.* v. *Government of India*, *supra*, 434 U.S. at 311. Congress demonstrated its understanding that consumers could recover damages by providing in Section 5 of the Clayton Act that judgments obtained by the United States against an antitrust violator would be "*prima facie* evidence" against the violator in private suits.

The *prima facie* evidence provision was "intended to help persons of small means" who wished to seek redress for antitrust injuries. See H.R. Rep. No. 627, 63d Cong. 2d Sess. 14 (1914); S. Rep. No. 698, 63d Cong. 2d Sess. 10 (1914). Congress' purpose in

[14] The Clayton Act was designated as "An Act to supplement existing laws against unlawful restraints and monopolies * * *." *Ibid.* Once again, consumer protection received emphasis as a primary statutory goal. See 51 Cong. Rec. 14213, 14216 (1914) (remarks of Sen. Shields); *id.* at 14222-14223 (remarks of Sen. Thompson); R. Bork, *The Antitrust Paradox*, *supra*, at 63.

adopting this provision was to facilitate suit "by individuals" (remarks of Sen. Walsh, 51 Cong. Rec. 13851-13852 (1914)), and the "poor man" (remarks of Sen. Thompson, *id.* at 14222). See also *id.* at 9073 (remarks of Rep. Webb). Congress recognized that deterrence of antitrust violations would be maximized by allowing suit not only by the injured "business man," but also by "the individual who is harmed by these practices" (*id.* at 16274) (remarks of Rep. Webb).

The Clayton Act thus carried forward the consumer protection goals of the Sherman Act. Congress retained the Sherman Act's provision entitling consumers to recover treble damages and added new procedures intended to help individual litigants maintain suits that otherwise would be impracticable. The legislative history confirms this Court's construction of the statute in *Chattanooga* that consumers suffering overcharges from antitrust violations may recover treble damages.

C. The Purposes Of Section 4 Are Served By Consumer Suits

1. Recent decisions of this Court that analyze the purposes served by Section 4 underscore the conclusion that consumers may recover for their direct losses. For example, in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, 429 U.S. at 486 n.10, the Court stated that the treble damages remedy serves "primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers." Section 4 " 'open[s] the door of justice to every man, whenever he may be injured by those who violate the

antitrust laws * * *.'" *Ibid.* See also *Pfizer Inc.* v. *Government of India, supra,* which holds that foreign governments may seek damages from domestic pharmaceutical manufacturers. Each of the plaintiffs in *Pfizer* claimed injury in its capacity as "a purchaser of antibiotics." 434 U.S. at 310. In light of the "expansive remedial purpose" of Section 4 (*id.* at 313), the Court sustained these consumer claims (*id.* at 312; citations omitted):

> The Court has previously noted the broad scope of the remedies provided by the antitrust laws. "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." * * * And the legislative history of the Sherman Act demonstrates that Congress used the phrase "any person" intending it to have its naturally broad and inclusive meaning. There was no mention in the floor debates of any more restrictive definition.

The Court repeatedly stated that Section 4 authorizes recovery by "American consumers." See 434 U.S. at 313, 314, 315. The Justices who dissented in *Pfizer* also concluded that Section 4 was "enacted to protect American consumers." *Id.* at 321.

The understanding that consumers may recover for their losses runs throughout the Court's decisions construing Section 4. See, *e.g.*, *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), which holds that attorney fee schedules fixing prices to be charged to consumers of legal services are unlawful. The Court stated that "in terms of restraining competition and harming consumers like petitioners the price-fixing activities

found here are unusually damaging" (*id.* at 782). See also *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U.S. 219, 236 (1948) (noting that "consumers" are among the persons entitled to sue for treble damages); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 489-490 (1968) (pointing out that a purchaser who "absorbs the loss" resulting from an antitrust overcharge may sue for treble damages and citing the *Chattanooga* case for the proposition that an overcharge causes injury to the purchaser's "property").[15]

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[15] Many lower federal courts also have concluded that overcharged consumers may recover. See, *e.g.*, *Cleary* v. *Chalk,* 488 F.2d 1315, 1319 n.17 (D.C. Cir. 1973), cert. denied, 416 U.S. 938 (1974); *Bravman* v. *Bassett Furniture Industries, Inc.,* 552 F.2d 90, 98-99 & n.23 (3d Cir.), cert. denied, 434 U.S. 823 (1977); *Theophil* v. *Sheller-Globe Corp.,* 446 F. Supp. 131, 135 (E.D.N.Y. 1978), appeal dismissed, No. 78-7389 (2d Cir. Jan. 3, 1979); *DeGregorio* v. *Segal,* 443 F. Supp. 1257, 1263 (E.D. Pa. 1978); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 1977-2 Trade Cas. ¶ 61,639 (C.D. Cal. Sept. 16, 1977); *In re Ampicillin Antitrust Litigation,* 1977-1 Trade Cas. ¶ 61,434 (D.D.C. May 17, 1977); *Lohse* v. *Dairy Comm'n,* 1977-2 Trade Cas. ¶ 61,805 (D.Nev. Dec. 21, 1977); *Lefrak* v. *Arabian Am. Oil Co.,* 405 F. Supp. 597, 598 (E.D.N.Y. 1975).

Four district court decisions have excluded retail nonbusiness consumers from the scope of Section 4, although three were issued on the same day by a single judge. See *Ware* v. *Trailer Mart, Inc.,* No. C 74-394 (N.D. Ohio May 31, 1978), appeal docketed, No. 78-3383 (6th Cir. July 20, 1978); *Weinberg* v. *Federated Department Stores, Inc.,* 426 F. Supp. 880 (N.D. Cal. 1977); *Gutierrez* v. *E. & J. Gallo Winery Co.,* 425 F. Supp. 1221 (N.D. Cal. 1977); *Smith* v. *Toyota Motor Sales U.S.A., Inc.,* No. 75-0727 (N.D. Cal. Jan. 11, 1977), appeals in all three cases docketed, Nos. 77-1724, 1725, 1845, 1850, 1851, 1852 (9th Cir.).

2. The court of appeals mistakenly concluded that this Court's decision in *Hawaii* v. *Standard Oil Co.*, *supra*, supported its restrictive interpretation of Section 4 (Pet. App. A-22 to A-23). In *Hawaii* the plaintiff State sought to recover treble damages both in its capacity as a purchaser and as *parens patriae* for its residents. The *parens patriae* claim rested on alleged injuries to the general economy of the State (405 U.S. at 255). This Court declined to create a right of action for injuries to the general economy, reasoning that such claims are not based on property or business losses. In limiting the State's recovery to injuries to its "commercial interests or enterprises," however, the Court did not hold that "business" injuries alone are compensable. The Court used the term "commercial" to refer to the interest of the State as a buyer, seller, or competitor. It expressly affirmed that where a state seeks recovery for injury incurred "as a consumer in the marketplace, through a 'payment of money wrongfully induced,' *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396 (1906), damages are established by the amount of the overcharge" (405 U.S. at 263 n.14). See also *id.* at 264-265.

In other words, the Court's decision in *Hawaii* does not restrict Section 4 to injuries inflicted on businesses. The case stands for the proposition that injuries to "business or property" must be proximate and concrete. See generally 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 334b at 163 (1978). Injuries to the general economy, speculative injuries, injuries remote

from the antitrust violation, and injuries that do not flow from a restriction of competition are outside the scope of Section 4. Direct injuries to a consumer's pocketbook, however, are compensable. 2 P. Areeda & D. Turner, *Antitrust Law*, *supra*, at ¶ 337b, p. 184. And even if *Hawaii* holds that the injury in question must be "commercial," that means no more than that the injury must take place in the course of commercial economic transactions. The transactions in this case surely meet that criterion: hearing aids are bought and sold as part of the commercial economy. Reiter and the members of her class participated in commercial transactions when they bought hearing aids, and they allege that they suffered economic injury in the course of this commerce.[16] That should be enough.

This Court's decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), also does not support the decision of the court of appeals. *Illinois Brick* held that direct purchasers of commodities are "injured to the full extent of the overcharge paid by them," and that it is unnecessary to attempt to "apportion the overcharge among all [indirect purchasers] that may have absorbed a part of it." 431 U.S. at 746. That result was appropriate, the Court concluded, because vigorous litigation by the direct victim of the antitrust

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[16] Our brief as amicus curiae in *Council for Employment and Economic Energy Use* v. *WHDH Corp.*, pet. for cert. pending, No. 78-486, discusses our conclusion that Section 4 pertains only to injuries that take place in economic transactions. We have furnished copies of that brief to counsel for the parties in this case.

violation would deter violations, and because the direct victim suffers "at least some and often most of the overcharge." *Ibid.* In the present case, petitioner (and her class) are the purchasers injured directly by the retail price maintenance scheme. Under the Court's analysis in *Illinois Brick*, they are the appropriate parties to seek redress for the overcharge.[17]

[17] The court of appeals' reliance on *GAF Corp.* v. *Circle Floor Co.*, 463 F.2d 752 (2d Cir. 1972), cert. dismissed, 413 U.S. 901 (1973) (Pet. App. A-24 to A-25); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), cert. denied, 414 U.S. 1045 (1973) (Pet. App. A-25); and *Tugboat, Inc.* v. *Mobile Towing Co.*, 534 F. 2d 1172 (5th Cir. 1976) (Pet. App. A-25 to A-26), is unwarranted.

Circle Floor holds that compensable injuries must stem from conduct that violates the antitrust laws. That decision anticipated the holding in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra*, that Section 4 allows recovery only for injury "that flows from that which makes the defendants' acts unlawful" (429 U.S. at 489). *Circle Floor* does not suggest that overcharges on goods bought for personal rather than business use are not compensable.

In re Multidistrict Vehicle Air Pollution holds that states may not seek damages for general injuries to buildings and other government property and interests, reasoning that such claims are akin to the claims disapproved in *Hawaii* v. *Standard Oil Co., supra.* The court noted that the injuries were unrelated to commercial transactions, but it did not hold that overcharges inflicted directly on retail purchasers are beyond the scope of Section 4.

Mobile Towing Co. holds that employees denied work opportunities and unions weakened in their ability to represent employees as a result of antitrust violations suffer commercial injury that may be redressed under Section 4. That opinion does not hold that retail consumers lack a protectable interest.

D. Consumer Suits Help To Deter Violations Of The Antitrust Laws

1. Private actions under Section 4 "deter violators and deprive them of 'the fruits of their illegality.'" *Pfizer Inc.* v. *Government of India, supra*, 434 U.S. at 314. See also *Illinois Brick Co.* v. *Illinois, supra*, 431 U.S. at 746; *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra*, 429 U.S. at 485-486. Injured parties suing for treble damages serve as "private attorneys general," whose activities help bring about compliance with the antitrust laws. *Hawaii* v. *Standard Oil Co., supra*, 405 U.S. at 262.

Unless consumers may recover for their losses, the deterrence of retail price fixing conspiracies will be minimal. Consumers are the only direct victims of retail price fixing conspiracies. Considering the importance to the national economy of controlling inflationary pressures in consumer retail markets, a decrease in effective deterrence would be regrettable.[18] See *Goldfarb* v. *Virginia State Bar, supra*, 421 U.S. at 782. The Antitrust Division of the Department of Justice can bring only 60 to 100 suits annually against antitrust violations of all kinds. Private treble damages actions are an essential supplement to the Division's enforcement efforts. In fiscal year 1978 private parties commenced 1,435 antitrust suits, while the United States instituted only 72. *1978 An-*

[18] The importance of vigorous competition in consumer retail markets can scarcely be overstated. Retail nonbusiness consumers purchase more than $1.2 trillion in goods and services annually. See *1978 Economic Report of the President* 257, Table B-1.

nual Report of the Director, Administrative Office of the United States Courts 78, Table 28. Private actions to curtail retail price fixing conspiracies are especially important, because such conspiracies often occur on a relatively small scale. The limited enforcement resources of the federal government necessarily must be concentrated on violations involving substantial amounts of commerce. Effective deterrence of local retail price fixing agreements cannot be achieved without consumer litigation.[19]

2. The court of appeals concluded that the "deterrent impact of such suits * * * does not outweigh their potentially ruinous effect on American business" (Pet. App. A-29). It asserted that small business firms are particularly susceptible to "nonmeritorious" class actions, and that class litigation would injure such firms and thus foster "oligopolistic" market conditions (*ibid.*).

The court of appeals' view of the "ruinous effect" of consumer suits is at odds with the congressional judgment. Congress intended to give consumers remedies both to allow them to recover for their losses and to deter potential violators. The judicial branch may not substitute its views for those of Congress concerning the appropriate way to enforce the antitrust laws.

[19] See D. Turner & C. Kaysen, *Antitrust Policy: An Economic and Legal Analysis* 257 (1959): "[P]rivate suits * * * may be the most effective way of policing the multitude of comparatively local * * * violations that will tend to escape the glance of federal enforcement authorities or that, even if noticed, do not merit the expenditure of limited enforcement resources."

See *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978); see also *TVA* v. *Hill*, No. 76-1701 (June 15, 1978), slip op. 38-40.

The court of appeals' view of the effect of consumer suits, moreover, is incorrect. The contention that consumer antitrust actions generally are "meritless" is difficult to accept; it entails the proposition that consumer suits such as *Goldfarb* v. *Virginia State Bar*, *supra*, do not result in substantial public benefits. The proper remedy for truly non-meritorious antitrust litigation is summary disposition in favor of the defendants. See, *e.g.*, *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289-290 (1968) (summary judgment for a defendant in an antitrust action is appropriate where the plaintiff failed to adduce "any significant probative evidence tending to support the complaint"). Cases should be decided on their merits; there is no justification for precluding all consumer complaints on the theory that the defendants may be entitled to judgment in some or even most of them. And if the objection is that class actions are unmanageable, then the maximum response should be not to certify unmanageable classes; there is no reason to bar consumer litgation altogether.[20]

[20] While the court of appeals was concerned about the administrative burdens that may result from class litigation (Pet. App. A-28 to A-30), this Court has referred with approval to antitrust class actions on behalf of "consumer-citizens." See *Hawaii* v. *Standard Oil Co.*, *supra*, 405 U.S. at 266:

> Congress has given private citizens rights of action for * * * damages for antitrust violations * * *. Rule 23 of

The conjecture of the court of appeals (Pet. App. A-28 to A-29) that small businesses are particularly susceptible to baleful consequences of non-meritorious class complaints is unsupported. The court did not explain why antitrust plaintiffs would sue small business defendants. Antitrust plaintiffs ordinarily sue defendants with "deep pockets"—defendants that have the money to pay substantial judgments. There

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the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources * * *.

Fed. R. Civ. P. 23(b)(3) vests the district courts with discretion to terminate unmanageable class proceedings in which common questions do not predominate, and Rule 23(c) allows courts to confine class actions to limited issues or subclasses of plaintiffs if proceedings would otherwise be unmanageable. See *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 179-186 (1974) (Douglas, J., dissenting in part). No decision has been rendered on the propriety of maintaining the present case as a class action.

The court of appeals' belief that class actions entail inefficient use of judicial time (Pet. App. A-28) has been the subject of academic study. One recent analysis, which involved extensive study of the work of two large federal districts, indicated that "[c]lass actions do not appear to consume inordinately large amounts of judicial time, and have in fact been at least as efficient as nonclass actions—if not more so—in terms of judicial time expended per dollars of recovery effected and per dollar's worth of injury recompensed." Bernstein, *Judicial Economy and Class Actions*, 7 J. Legal Studies 349, 369 (1978). The study found that in one district class actions were 1.3 times as efficient as nonclass actions and in another district were 4.74 times as efficient. These data raise serious doubts about the correctness of the court of appeals' belief.

is thus no reason to conclude that consumer class actions impose undue burdens on small business firms.[21]

E. The Decision Of The Court Of Appeals Would Nullify The *Parens Patriae* Title Of The Hart-Scott-Rodino Antitrust Improvements Act Of 1976

The court of appeals apparently believed that its decision would not interfere with the ability of state attorneys general to prosecute consumer antitrust claims under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 15c-15h (Pet. App. A-29). The court of appeals is wrong. The court held that overcharged consumers are not injured in their "property" within the meaning of Section 4 of the Clayton Act. That interpretation would foreclose consumer claims under the Antitrust Improvements Act.

The *parens patriae* provision of the Antitrust Improvements Act provides:

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[21] The court of appeals did not refer to a statistical study or any other authority suggesting that small businesses are likely to be named as defendants in antitrust class actions. There is, of course, very little to be gained by suing defendants of limited means in treble damages class actions, and few plaintiffs would undertake the expense and burden of antitrust litigation in such circumstances. Moreover, attempts to bring antitrust actions *against* a class of small business defendants are not likely to be availing. Defendant class actions easily can be defeated by defendants "opting out" of the class. See Fed. R. Civ. P. 23(c). See also *Appleton Electric Corp.* v. *Advance United Expressways*, 494 F. 2d 126, 140 (7th Cir. 1974); *Kline* v. *Coldwell, Banker & Co.*, 508 F. 2d 226, 238-239 (9th Cir. 1975) (Dunniway, J., concurring).

> Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State * * * to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of Sections 1 to 7 of this title.

15 U.S.C. 15c(a)(1). Consumer recovery under this provision, like Section 4 of the Clayton Act, must be based on "property" injuries. As the Court concluded in *Illinois Brick Co.* v. *Illinois*, *supra*, 431 U.S. at 734 n.14, "Congress made clear * * * that this legislation did not alter the definition of which overcharged persons were injured within the meaning of § 4. It simply created a new procedural device—*parens patriae* actions by States on behalf of their citizens—to enforce existing rights of recovery under Section 4." *Parens patriae* suits are " 'an alternative means * * * for the vindication of existing substantive claims.' " *Ibid.* The Eighth Circuit has held that consumers have no "existing substantive claims;" it necessarily follows that state attorneys general cannot sue in their behalf. Moreover, the Antitrust Improvements Act authorizes *parens patriae* actions only on behalf of "natural persons." 15 U.S.C. 15c(a)(1). Congress intended to provide an effective mechanism to enforce the Section 4 claims of "consumers," as distinguished from those of businesses. See H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 3-8 (1975); S. Rep. No. 94-803, 94th Cong., 2d Sess. 5-10, 39-42 (1976). Because consumers are the only

persons whose claims may be asserted in *parens patriae* proceedings, and because the decision below strips them of their substantive rights of action, it vitiates the entire *parens patriae* statute.

While it is quite true that Congress' beliefs when enacting the Antitrust Improvements Act are not "dispositive" in construing the scope of Section 4 of the Clayton Act, and subsequent legislative developments "cannot serve to change the legislative intent of Congress" in enacting Section 4 (*Illinois Brick Co.* v. *Illinois*, *supra*, 431 U.S. at 734 n.14), the passage of the Antitrust Improvements Act underscores the consistent position of Congress that consumers have remedies under Section 4.[22] That understanding reinforces the original legislative purpose.[23] The course of legislation from 1890 to 1976 discloses a continuing congressional desire to grant consumers effective redress for antitrust injuries. In these circumstances, Congress' enactment of the Antitrust Im-

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[22] In *Illinois Brick* this Court held that recognizing claims of indirect purchasers would conflict with the purposes of Section 4, and it concluded that statements of individual legislators occurring after the passage of Section 4 would not justify a departure from those purposes. Here, however, the foundation for the entire statute was that consumers have rights under Section 4. That premise is perfectly consistent with the views of Congress in 1890 and 1914. See pages 12-19, *supra*.

[23] See H.R. Rep. No. 94-499, *supra*, at 6: "Under Section 4 of the Clayton Act, any person, including any consumer, who can prove he was injured by price-fixing or any other antitrust violation, has a cause of action." Accord, S. Rep. No. 94-803, *supra*, at 39.

provements Act is an additional ground for holding that consumers may recover under Section 4. See, *e.g.*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969) ("[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction"); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *FHA* v. *Darlington, Inc.*, 358 U.S. 84, 90 (1958).[24]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[24] Pages 24-28 of our brief as amicus curiae in *Oscar Mayer & Co.* v. *Evans*, No. 78-275, cert. granted (Oct. 30, 1978), discuss at greater length the circumstances under which subsequent legislation and legislative history is valuable in the construction of a statute. We have furnished copies of that brief to counsel for the parties in this case.

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